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No. 94 385 AUG 31 1994

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In The

Supreme Court of the United States

October Term, 1993

EXXON CORPORATION, ET AL.,

Petitioners,

v.

EYAK NATIVE VILLAGE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a notice of removal filed within 30 days of the initial filing of an action in state court can conceivably be untimely under 28 U.S.C. 1446(b), as the Court of Appeals held?

(2) Whether, as other circuits have held in conflict with the decision below, 28 U.S.C. § 1447(c) precludes remand on the basis of a perceived defect in removal procedure not raised in a timely motion?

PARTIES IN THE COURT BELOW

Approximately 4000 persons and entities, plaintiffs in the district court, were parties to the proceedings in the Court of Appeals, although only a much smaller number are directly affected by the matters raised in this Petition. Because of its volume, a list of all such parties is given in the attached Appendix E, which also identifies the subset of parties who are directly affected by this Petition. A number of parties in the Court of Appeals also sued on behalf of classes comprising all commercial fishermen, Alaska Natives, landowners, cannery workers, and area businesses alleging injury or damage from the grounding of the tanker EXXON VALDEZ in Prince William Sound, Alaska, on March 23, 1989, and the resulting oil spill.

In addition, Alyeska Pipeline Service Company and its owners, Amerada Hess Pipeline Corporation, Arco Transportation Alaska, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, BP Pipelines (Alaska), Inc., Phillips Alaska Pipeline Corporation, Unocal Pipeline Company, and George M. Nelson (all of whom were defendants in the district court) were also parties in the Court of Appeals.

RULE 29.1 STATEMENT

Petitioner Exxon Corporation has no corporate parent, and is the corporate parent of petitioner Exxon Shipping Company. Petitioners have numerous subsidiaries that are not wholly owned, a list of which is given in the attached Appendix F pursuant to Supreme Court Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI

Exxon Corporation and Exxon Shipping Company (collectively, "Exxon") respectfully petition for a writ of *certiorari* to review that portion of the judgment of the United States Court of Appeals for the Ninth Circuit which reversed the district court's Orders Nos. 91, 92 and 108, which orders denied remand to state court of *Daniel R. Adams, et al. v. Exxon Corp., et al.*, Case No. A92-353 Civ. (D. Alaska); *David M. Adams, et al. v. Exxon Corp., et al.*, Case No. A92-461 Civ. (D. Alaska); and *Talmadee Adams, et al. v. Exxon Corp., et al.*, Case No. A92-584 Civ. (D. Alaska).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 25 F.3d 773 and reprinted in the attached Appendix at App. 1a.[1] The relevant orders of the United States District Court for the District of Alaska are unreported and are also reproduced in the Appendix, as follows: Order No. 91 is reprinted at App. 50a; Order No. 92 is reprinted at App. 54a; and Order No. 108 is reprinted at App. 58a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on May 27, 1994; Exxon's timely petition for partial rehearing was denied July 13, 1994. App. 62a. This petition is timely, being filed within 90 days thereafter.

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[1] Page citations to materials in the Appendix appear as "App. 00a."

STATUTORY PROVISIONS INVOLVED

The relevant statutes, 28 U.S.C. §§ 1331, 1333, 1441, 1446 and 1447, are reproduced in Appendix D.

STATEMENT OF THE CASE

On March 23, 1989, the tanker EXXON VALDEZ ran aground in Prince William Sound, Alaska, resulting in a large oil spill, which was followed almost immediately by the filing of several scores of lawsuits in both state and federal court. These lawsuits generally named petitioner Exxon Shipping Company, the owner of the tanker; petitioner Exxon Corporation, the owner of the crude oil aboard the tanker; and Alyeska Pipeline Service Company and its owner companies (collectively, "Alyeska") who own and operate the Trans-Alaska Pipeline System and the Valdez Marine Terminal where tankers are loaded with crude oil from Alaska's North Slope.

In state court the cases were consolidated for pretrial purposes before Alaska Superior Court Judge Brian Shortell of the Third Judicial District at Anchorage, while the cases in federal court were consolidated before the Hon. H. Russell Holland, Chief Judge, in the District Court for the District of Alaska. On February 3, 1992, the consolidated state court plaintiffs filed a joint Preliminary Designation of Issues for Trial (the "Designation") pursuant to an order of the state court requiring all parties to file a statement of the issues that they intended to litigate at trial. Under the state court's consolidation and case management orders, the Designation was binding on all state court plaintiffs.

In the Designation, plaintiffs asserted that Alyeska was responsible for causing the oil spill and was therefore liable to plaintiffs for compensatory and punitive damages. This claim was based on allegations that Alyeska, as operator of the Valdez Marine Terminal, had negligently failed to require that tankers calling there have double hulls; that Alyeska had similarly failed to require tug escorts and special navigation equipment for tankers transiting Prince William Sound; and finally, that Alyeska had successfully procured from the district court, in the case of *Chevron, U.S.A., Inc. v. Hammond*, 1978 A.M.C. 1697 (D. Alaska 1978), an injunction against the enforcement and implementation of Alaska statutes and regulations that would have required double hulls, tug escorts, and special navigation equipment.

On February 13, 1992, well within 30 days after the filing of the Designation, Alyeska removed the cases to the district court, on the theory that plaintiffs' claims amounted to a collateral attack on the district court's judgment in *Chevron v. Hammond*, and thus raised a federal question under 28 U.S.C. § 1331. Plaintiffs moved to remand, and on July 31, 1992, the district court entered its Order No. 83, denying the motion to remand, and upholding federal jurisdiction over plaintiffs' cases.

Following the initial removals, three new cases were filed in state court. *Daniel R. Adams, et al. v. Exxon Corp., et al.*, was filed March 18, 1992; *David M. Adams, et al. v. Exxon Corp., et al.*, was filed June 3, 1992; and *Talmadee Adams, et al. v. Exxon Corp., et al.*, was filed August 11, 1992. Those three cases are the ones involved in this Petition. Under the state court's consolidation and case management orders, the Designation (like all other orders in the state court proceedings) became binding on plaintiffs in newly-filed actions, absent an appropriate motion to be excluded from the

effect thereof. Plaintiffs in the three newly-filed actions did not take any action to disavow the Designation, and it became binding on them. App. 51a-52a, 55a-56a & 59a-60a.

Within thirty days of the date each case was filed in state court, defendants filed a notice of removal.[2] Plaintiffs moved to remand. None of plaintiffs' motions asserted that the removals were untimely, but urged rather that the Designation did not raise any federal question. On September 15 and 17, 1992, the district court entered its Orders Nos. 91 and 92, respectively, denying the remand motions in *Daniel R. Adams* and *David M. Adams* on the ground that it had already ruled, in Order No. 83, that the Designation raised a federal question that would support removal, and that since the Designation was binding on plaintiffs in the newly-filed actions, federal jurisdiction existed over the new plaintiffs' claims as well. App. 50a & 54a. On November 16, 1992, the district court entered a similar order denying the motion to remand in *Talmadee Adams*. App. 58a.

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[2] *Daniel R. Adams* was filed March 18, 1992; notice of removal was filed April 16, 1992. App. 50a-51a. *David M. Adams* was filed June 3, 1992; notice of removal was filed June 26, 1992. *Talmadee Adams* was filed August 11, 1992; notice of removal was filed September 8, 1992.

On February 1, 1993, the district court certified Orders Nos. 83, 91, 92, and 108 for interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). The Court of Appeals granted leave to appeal, and the matter was argued on July 13, 1993, and decided on May 27, 1994.[3] App. 1a.

Most of the Court of Appeals' opinion is devoted to affirming the district court's Order No. 80, which is not involved in any way in this Petition. In Section III of its opinion, the Court of Appeals discussed and reversed Order No. 83 on the ground that the removals at issue in that order were untimely, since the federal issues had been present more than thirty days prior to removal. 28 U.S.C. § 1446(b). The Court of Appeals did not reach the merits of the jurisdictional issue, and expressed no view on the question of whether plaintiffs' claims set forth in the Designation raised federal questions under 28 U.S.C. § 1331. This Petition does not address the correctness of the Court of Appeals' ruling that the removals involved in Order No. 83 were untimely.

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[3] In the meantime, plaintiffs and petitioners had gone to trial in district court in Alaska, in a phased trial before a single jury. The first phase of the trial considered whether the conduct of petitioners in connection with the grounding of the EXXON VALDEZ was reckless; on June 13, 1994, the jury rendered a verdict that it was. The second phase of the trial considered the compensatory damage claims of commercial fishermen plaintiffs; on August 11, 1994, the jury rendered a verdict in the amount of $287 million, as compared to the $853 million plaintiffs had sought. (This verdict will be subject to substantial offsets, including offsets for the $164 million in claims payments to fishermen that petitioners made voluntarily in 1989.) The third phase of the trial considers the question of the amount, if any, of punitive damages that should be awarded against petitioners. As of August 29, 1994, that issue had gone to the jury but no verdict had yet been rendered.

The Court of Appeals also reversed Orders Nos. 91, 92 and 108 on the ground of untimeliness. The court's opinion gives no explanation of the basis of this ruling except the statement that "Alyeska's removal notices were untimely." App. 25a. This statement is indisputably untrue as to Orders Nos. 91, 92 and 108; the removal notices involved in those orders were all filed within 30 days of the filing of the cases, within the period prescribed by 28 U.S.C. § 1446(b). *See* note 2, *supra*. Moreover, as discussed below, plaintiffs never filed in the district court a motion for remand asserting that the removals involved in Orders Nos. 91, 92 and 108 were untimely, and never asserted such a position in their briefs in the Court of Appeals. The effect of the judgment of the Court of Appeals, accordingly, was to deprive the district court of jurisdiction over these cases without explanation, on a ground that is indisputably contrary to the facts shown by the record, and which was never previously urged by any party in any court.

Petitioners timely sought rehearing in the Court of Appeals on June 10, 1994.[4] The petition for rehearing was denied on July 13, 1994. App. 62a.

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[4] Plaintiffs also sought rehearing of the Court of Appeals' ruling with respect to Order 80, and suggested the appropriateness of a rehearing *en banc*. That petition was also denied.

REASONS FOR GRANTING THE WRIT

In *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699 (1972), this Court set forth the rule that the federal removal statutes are intended to have "uniform nationwide application." *Id.* at 705. The decision of the court below, in direct conflict with the plain language of the removal statutes, and with several decisions of other circuits, stands in utter disregard of the Court's admonition in *Grubbs*, and raises special and important issues fully deserving the attention of this Court. *See* S. Ct. Rule 10.1. In this case there is both a conflict among the circuits (on the important question of whether remand may occur on the basis of a perceived defect in removal procedure in the absence of a timely motion raising the issue) *and* a Court of Appeals that has departed so far from the accepted and usual course of judicial proceedings (by depriving the district court of jurisdiction without explanation, on a ground not raised in any court, and on a theory contrary to the facts) as to warrant the exercise of this Court's supervisory authority.

I. The Decision Below Disregards The Plain Meaning Of 28 U.S.C. § 1446(b), Which Allows Removal Within 30 Days After Receipt Of An Initial Pleading.

Section 1446(b) provides unambiguously that a notice of removal "shall be filed within thirty days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ." 28 U.S.C. § 1446(b). In each case at issue in the district court's Orders Nos. 91, 92 and 108, a notice of removal was filed within 30 days after receipt of the initial complaint. *See* note 2, *supra*. At no time have plaintiffs disputed that this was the case -- nor could they. Under *no* interpretation of section 1446(b) can it fairly be

said that the removals were untimely, and the Court of Appeals offered none. The decision ignored the statute, and the facts. It deprived the district court of its jurisdiction properly obtained, and did so on the basis of a nonexistent defect in removal procedure.[5]

II. The Decision Below Conflicts With Other Circuit Decisions Holding That 28 U.S.C. § 1447(c) Precludes Remand On The Basis Of A Defect In Removal Procedure Which Was Not Raised In A Timely Motion to Remand.

Even if some argument could be constructed to support the proposition that the removals at issue were untimely, the question remains, did the Ninth Circuit act outside its authority under 28 U.S.C. § 1447(c) in ordering remand? The question is simple, and purely legal. The Ninth Circuit's answer was wrong, and conflicts with other circuit decisions on similar facts.

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[5] Plaintiffs have suggested, in their opposition to petitioners' motion for rehearing in the Court of Appeals, that petitioners agreed in earlier briefing that a reversal of the district court's Order No. 83 as untimely would require reversal of the district court's Orders Nos. 91, 92 and 108. Plaintiffs are mistaken. Petitioners agreed only with the statement in *plaintiffs'* opening brief in the Court of Appeals that as to "the theory that plaintiffs' state law claims 'are an indirect attempt to enforce the requirements of the Alaska Tanker Law' and therefore 'are a collateral attack on *Chevron v. Hammond*,'" Orders Nos. 91, 92 and 108 "adopt[ed] and rel[ied] on the theory of Order No. 83," Pl. Op. Br. at 14, and that, therefore, petitioners "agree[d] with plaintiffs that the outcome as to Order 83 w[ould] govern the outcome as to Orders 91, 92, and 108." App. Br. at 2. Since no issue as to the timeliness of the removals in Orders Nos. 91, 92 or 108 had ever been raised or was properly before the Court of Appeals, this language cannot reasonably be read as conceding an issue that petitioners had no reason to believe was present.

Section 1447(c) provides that "[a] motion to remand a case on the basis of any defect in removal procedure *must* be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c) (emphasis added).[6] It has been uniformly held that the failure to file a timely notice of removal is a procedural, *not* a jurisdictional, defect. *See F.D.I.C. v. Loyd*, 955 F.2d 316, 320-21 (5th Cir. 1992); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 64-66 (3d Cir. 1989); *Wilson v. Gen. Motors Corp.*, 888 F.2d 779, 781 n. 1 (11th Cir. 1989); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).[7]

It follows that the defect in removal on which the court below relied -- the so-called "untimeliness" of Alyeska's removals -- was waived unless raised in a timely motion to remand.[8] *See Hamilton v. Aetna Life & Cas. Co.*, 5 F.3d

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[6] The purpose of section 1447(c) is to prevent forum shopping by defendants who might otherwise hold a procedural defect in reserve, but more importantly, to avoid the many burdens placed on state and federal courts, and parties, of shuffling cases between two courts which each have subject matter jurisdiction. *See* H.R. Rep. No. 889, 100th Cong., 2d Sess. 1, 72, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 6033; *F.D.I.C. v. Loyd*, 955 F.2d 316, 322-23 (5th Cir. 1992); *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1212-13 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991).

[7] *See also* H.R. Rep. No. 889, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 6033 (defect in removal procedure includes "any ground other than lack of subject matter jurisdiction"); Siegel, *Commentary on the Revision of Section 1447*, 28 U.S.C.A. § 1447 (West 1994) (an example of a procedural defect in removal "would be where the case was removed too late under subdivision (b) of § 1446").

[8] The settled rule, set forth by this Court, is that a mere "irregularity" in a removal may be waived where the case might originally have been brought in the district court. *See Am. Fire & Casualty Co. v. Finn*, 341

642, 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1100 (1994); *In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (5th Cir. 1992); *Air-Shields*, 891 F.2d at 65; *Wilson*, 888 F.2d at 781 n. 1. It is undisputed, however, that plaintiffs below did *not* challenge, at any time in any motion to remand, the timeliness of the removals at issue in the district court's Orders Nos. 91, 92 and 108. Neither their motions to remand filed in district court, nor their briefs in the Court of Appeals, raised this issue.

The question is thus whether a Court of Appeals may reverse the district court and order remand of a case on the basis of a defect in removal procedure waived by plaintiffs by their failure to assert that defect in a timely motion to remand in the district court. The decision below necessarily depends on the existence of such a power, although the court below did not explain the basis for its action. Whatever the court may have had in mind, its decision squarely conflicts with the decisions of several other circuits. *See Loyd*, 955 F.2d at 322 (emphasis added) (Fifth Circuit: section 1447(c) "preclud[es] *all* remands for procedural defects after the expiration of the thirty-day remand period specified by [that section]"); *Hamilton*, 5 F.3d at 644 (Second Circuit: "Given the passage of more than 30 days without a challenge, the court lacked authority under § 1447(c) to remand the action on th[e] ground" that the removal "was procedurally improper"); *Air-Shields*, 891 F.2d at 66 (Third Circuit: a federal court exceeds its "statutorily defined power" by remanding a case for procedural defects in removal "after the

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U.S. 6, 19 (1951); *Mackay v. Uinta Dev. Co.*, 229 U.S. 173, 176-77 (1913). Whether brought in state or federal court, these cases are maritime and governed by maritime law; thus, subject matter jurisdiction exists under 28 U.S.C. § 1333.

thirty day limit imposed by the revised Section 1447(c) ha[s] expired").[9] The decision below should not stand.

CONCLUSION

For the foregoing reasons, a petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 29, 1994

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[9] Even the Ninth Circuit has refused to extend to its own district courts the authority to remand cases after the 30 day limit set forth in 28 U.S.C. § 1447(c). *See Maniar v. F.D.I.C.*, 979 F.2d 782, 786 (9th Cir. 1992).

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APPENDIX A

Decision and order of the United States Court of Appeals for the Ninth Circuit in *Eyak Native Village, et al. v. Exxon Corporation, et al.*, 25 F.3d 773 (9th Cir. May 27, 1994) 1a

APPENDIX B

(i) Order No. 83 of the United States District Court for the District of Alaska regarding motions to remand, *In re the EXXON VALDEZ,* Case No. A89-095 Civil (Consolidated) (July 31, 1992) 26a

(ii) Order No. 91 of the United States District Court for the District of Alaska regarding motion for remand in Case No. A92-353 Civil (P-5464 to P-5576), *In re the EXXON VALDEZ,* Case No. A89-095 Civil (Consolidated) (September 15, 1992) 50a

(iii) Order No. 92 of the United States District Court for the District of Alaska regarding D.M. Adams' (P-5584 through P-5618) motion to remand in Case No. A92-461, *In re the EXXON VALDEZ,* Case No. A89-095 Civil (Consolidated) (September 17, 1992) 54a

(iv) Order No. 108 of the United States District Court for the District of Alaska regarding motion for remand in Case No. A92-584 Civil (P-2989, P-2997, P-3004, P-4169 and P-5619 through P-5643 Motion for Remand), *In re the EXXON VALDEZ*, Case No. A89-095 Civil (Consolidated) (November 16, 1992) 58a

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APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

No. 93-35274.

EYAK NATIVE VILLAGE, et al.,
Plaintiffs-Appellants,

v.

EXXON CORPORATION, et al.,
Defendants-Appellees.

Decided May 27, 1994.

Before: CHOY, HUG AND LEAVY, Circuit Judges.

HUG: Circuit Judge:

This case requires us to determine whether the district court's denial of motions to remand cases removed from an Alaska state court was error. This interlocutory appeal concerns the removal of over 160 separate cases brought in the Superior Court of the State of Alaska. Plaintiffs sued Exxon and Alyeska under Alaska law for the injuries caused

by the *Exxon Valdez* oil spill.[1] The cases proceeded in state court for several years before defendants Exxon and Alyeska removed the cases to district court on the basis that federal questions had arisen justifying removal. The issue on appeal is whether removal to federal court was appropriate.

The appeal is from five district court orders (Nos. 80, 83, 91, 92, 108) denying motions to remand to the Superior Court of the State of Alaska a number of different removed cases. We granted permission to appeal pursuant to 28 U.S.C. § 1292(b), and we now affirm in part and reverse in part.

I.

GENERAL BACKGROUND OF LITIGATION

Hundreds of cases were filed in both the Alaska Superior Court and the federal district court seeking relief from Exxon and Alyeska for various injuries caused by the March 1989 *Exxon Valdez* oil spill. Exxon was sued as the owner and operator of the tanker that went off course and ran aground (Exxon Shipping Co.) and as the owner of the more than 11 million gallons of oil that spilled (Exxon Corp.) for failure to perform its statutory and common law responsibilities in connection with the spillage and the clean up. The Alyeska defendants are pipeline companies that own and operate the Trans-Alaska Pipeline System and the terminal at which the *Exxon Valdez* had been loaded.

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[1]"Exxon" refers to Exxon Corporation, Exxon Shipping Company, Exxon Transportation Company, and individual defendants who are current or former Exxon employees. "Alyeska" refers to Alyeska Pipeline Service Company, the six oil companies which, in addition to Exxon, are its co-owners, and individual defendants employed by Alyeska.

The plaintiffs sue on their own behalf and in some cases as representatives of plaintiff classes, including commercial fishermen whose fishing grounds were damaged by the oil, Alaska Natives who subsist on various fish and other resources, processors of fish harvested from the affected area, employees of processors, area businesses and land owners, and other injured persons. The federal court complaints seek relief under maritime law and the remedial provisions of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c) ("TAPAA"). The complaints filed in state court seek relief under the Alaska Environmental Conservation Act, 46 Alaska Stat. §§ 46.03.822, *et seq.*, which establishes strict liability for oil spills, and also under Alaska's tort law.

The federal court cases were consolidated for pretrial purposes before District Judge H. Russel Holland and the state court cases were consolidated before Judge Brian Shortell of the Third Judicial District of the Alaska Superior Court. The state and federal courts cooperated in some stages of the proceedings. They selected the same lead and liaison counsel and a common executive committee for the plaintiffs, appointed a single discovery master, and jointly heard motions.

The State of Alaska and the United States Government also brought actions against the defendants on behalf of the public for injury to natural resources pursuant to the provisions of the Clean Water Act, 33 U.S.C. § 1321(f), and other federal environmental legislation. On October 8, 1991, the state and federal governments' claims against Exxon Corp. and Exxon Shipping Co. were resolved by entry of an Agreement and Consent Decree in the district court. The Agreement and Consent Decree provided for Exxon Corporation and Exxon Shipping to pay the governments at least nine hundred million dollars ($900,000,000) to restore

and rehabilitate the damaged natural resources in exchange for a release of all claims, including natural resources claims on behalf of the public. There is also a provision for an additional one hundred million dollars ($100,000,000) for unexpected damages under certain conditions.

Four environmental organizations sought to recover damages from Exxon to contribute to a conservation trust fund for the benefit of the general public to restore the environment and natural resources damaged by the oil spill. We have designated these plaintiffs as the "trust plaintiffs." On November 21, 1991, the Exxon defendants removed to federal court all cases related to the environmental organizations' cases. The Exxon removals are based on the ground that the claims of the Trust plaintiffs raised a federal question because the trust plaintiffs continued to pursue their claims for natural resources damages after the federal consent decree was entered to cover the same natural resources damages. Exxon also removed other non-removable claims that had been joined with the claims of the trust plaintiffs. The district court's Order No. 80 denied the plaintiffs' motions to remand their cases to state court. Those plaintiffs timely appeal.

On February 13, 1992, Alyeska removed approximately 150 cases to federal court. Those plaintiffs had contended that Alyeska had violated state safety standards. Alyeska argued that this raised a federal question because it attacked a 1979 federal district court decree enjoining the state from enforcing certain provisions of the Alaska Tanker Law. The plaintiffs' motions to remand were denied int eh district court's Orders No.s 83, 91, 92, and 108. The plaintiffs timely appeal.

II.

ORDER NO. 80: THE EXXON REMOVALS

A. *Background*

The trust plaintiffs are composed of four environmental organizations—National Wildlife Federation ("NWF"), Wildlife Federation of Alaska ("WFA"), Natural Resources Defense Council ("NRDC"), involved in one action, and Alaska Sportfishing Association ("ASA")—and also four individuals, originally involved in a separate action.

NWF, WFA, and NRDC filed a complaint on August 17, 1989, in *National Wildlife Federation v. Exxon,* Superior Court No. 3AN-89-6957, stating 10 causes of action based on strict liability, negligence, and nuisance. The other plaintiffs stated similar liability claims int eh Amended and Consolidated Class Action Complaint filed in *Alaska Sportfishing Association v. Alyeska Pipeline Service Co.,* Superior Court No. 3AN-89-5188, on July 17, 1989.

On September 3, 1991, the trust plaintiffs moved to certify a conservation trust fund class to include "[a]ll persons whose use, enjoyment, aesthetic and environmental interests in the protection and enhancement of the ecosystem, wildlife and other natural resources of Prince William Sound and the Oil Impact Area" were injured by the oil spill. The class excluded the commercial and subsistence use and enjoyment interests of the classes already certified.

The relief sought by the trust plaintiffs in the certification of the trust fund class was creation of a conservation trust to restore the ecology of the oil impact area, to protect the area from further environmental harm, to

restore wildlife populations on land and in the sea, to fund scientific studies and monitoring of the area, and to acquire resources equivalent to those lost in the spill. The trust plaintiffs claimed that the trust class was necessary because the State of Alaska could not adequately represent them due to its conflict of interest, and noted that Alaska law provides for individual actions where there is a potential conflict of interest between the Government and a class of private persons.

A little over a month after the trust plaintiffs filed for class certification, the Agreement and Consent Decree between the Untied States, Alaska, and the Exxon and Alyeska defendants was filed in federal court on October 8, 1991. The consent decree stated that the natural resources damages included relief recoverable by the governments "in their capacity as trustees of Natural Resources on behalf of the public" for injury to *all* natural resources resulting from the oil spill, "under *any* federal or state statute or maritime or common law relating to the environment."

The trust plaintiffs, however, proceeded with their action, and filed their reply brief in support of certification of a conservation trust class in state court on October 22, 1991. Anticipating the defense of *res judicata,* the trust plaintiffs argued that the consent judgment was not binding because the State was not fully representative of all interests. They asserted that they were entitled to sue as trustees for public users of the natural resources as a supplement to the damages secured by the State and the United States in the consent decree for two reasons.

First, the trust plaintiffs asserted that the State had a conflict of interest in negotiating the decree because of its own potential liability exposure. Second, they claimed that

the settlement did not provide sufficient funds for environmental injuries, a fact that they claimed was indicated by the State's negotiating in secret and its failing to reveal the reports of economic studies on which it had purportedly relied. The trust plaintiffs' reply brief also stated, however, they were not challenging the government settlement, but were seeking only supplementary and non-conflicting recovery through the proposed trust fund.

In notices of removal filed November 21, 1991, Exxon removed the trust plaintiffs' cases, *National Wildlife Federation v. Exxon* and *Eyak Native Village v. Exxon,* to federal court. Exxon contended that the trust plaintiffs' October 22, 1991, reply brief, which continued support of certification of a conservation trust fund class to pursue claims for environmental damages on behalf of the general public, was in derogation of the federal judgment and raised a federal question justifying removal of the *National Wildlife* case. Exxon removed the class plaintiffs in the *Eyak* case pursuant to 28 U.S.C. § 1441(c) on the ground that this consolidated class action involved independent claims jointed with the *National Wildlife* case.

Exxon also removed *Wisner v. Exxon,* Superior Court No. 3KO-89-265, on the ground that it, too, was joined with the trust plaintiffs' actions.

B. *Trust Plaintiffs' Motion to Remand*

In Order No. 80, the district court denied remand of the trust plaintiffs' cases removed by Exxon. The trust plaintiffs had asserted that they were entitled to seek damages on behalf of the public for injury to natural resources in addition to those that the governments had obtained by the consent judgment. The district court held that removal was

appropriate under the authorities that permit removal when a state litigant makes a collateral attack on a federal judgment. Judge Holland construed the trust plaintiffs' reply brief as seeking relief from the decree on the basis that it was fraudulently obtained.

The district court concluded that the October 22, 1991, reply brief raised a federal claim in the form of an independent action in equity, or a Federal Rule of Civil Procedure 60(b)(3) motion for relief from the consent decree. Relying on *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976), the court concluded that the reply brief raised a federal claim sufficient for removal under 28 U.S.C. § 1441(a).

We review *de novo* the district court's denial of a motion to remand an action removed from state to federal court. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1371 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987).

Any action based on a claim or right that arises under federal law may be removed to federal court pursuant to 28 U.S.C. § 1441, if a notice of removal is filed within 30 days after the defendant receives "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b) (1988).

Exxon stated as ground for removal that the reply brief, which continued the trust plaintiffs' litigation despite the consent decree, raised a federal question of the construction of the consent decree and whether the consent decree was res judicata as to the trust plaintiffs' claims. In denying the motion to remand, the district court did not rely on this ground but, instead, construed the reply brief as transforming

the trust plaintiffs' action into an attack on the consent decree in the nature of a motion or independent action provided for under Rule 60(b).

The reply brief could not be construed as transforming the complaint into a Rule 60(b) motion because it was not made in the federal action. However, Rule 60(b) has a saving clause that preserves a court's power to entertain an independent action in equity to obtain relief from judgment: a motion may be treated as an independent action in equity, or vice versa. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2868, at 244 (1973). Appellants contend that this was inappropriate because they would have lacked standing to seek Rule 60(b)-type relief because they were not parties to the consent decree. However, a nonparty may seek relief from a judgment procured by fraud if the nonparty's interests are directly affected. *See Kem Manufacturing Corp. v. Wilder,* 817 F.2d 1517, 1521 (11th Cir. 1987); *see also Southerland v. Irons,* 628 F.2d 978, 980 (6th Cir. 1980). Moreover, a court has "inherent power . . . to investigate whether a judgment was obtained by fraud," and may bring before it "all those who may be affected . . . ." *See Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. 575, 580 (1946).

Further, Rule 60(b) or an independent action allows relief from judgment to be given to "a party or his legal representative." This allows one who is in privity with a party to move for relief. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2865, at 225-26 & n.58 (1973). The citizens whom the trust plaintiffs sought to represent were more than in privity with the State; they were identical. Where the State is a party to relevant proceedings, then citizens are represented in those proceedings and are bound by the judgment. *Washington v. Washington State*

Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692-93 n.32, *modified on other grounds,* 444 U.S. 816 (1979); *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 340-41 (1958); *United States v. Baker,* 641 F.2d 1311, 1314 n.5 (9th Cir. 1981).

Other jurisdictions have held that an action to obtain relief from a federal judgment presents a general federal question, which may support removal to federal court. *See Villarreal,* 529 F.2d at 1221; *Deauville Assocs., Inc. v. Lojoy Corp.,* 181 F.2d 5 (5th Cir.), *cert. denied,* 340 U.S. 905 (1950); *See also* 7 James W. Moore, et al., Moore's Federal Practice ¶¶ 60.37[2](3) (federal court should be independent of state law in determining what grounds will support an independent action for relief from a federal judgment); 60.38[1] (such an action involves the validity of the judgment, and the substantive principles of the action are federal) (2d ed. 1993).

[1] The district court's treatment of the trust plaintiffs' claims as an independent action for relief from judgment recharacterized their claims as federal claims, because the alleged conflict of interest of the State and the insufficiency of the recovery implied that the decree was fraudulently obtained. The State of Alaska acted in its capacity as trustee of natural resources on behalf of the public. The general public that the trust plaintiffs sought to represent is the same general public the State represented. The consent decree covered essentially the same claims as were raised by the trust plaintiffs: damage to natural resources. The consent decree specified that it contained full compensation for the public's claim for natural resources damages.

The district court noted that the reply brief asserted that the State had a conflict of interest in representing the public's

interest in natural resources and quoted the following portions of the reply brief:

> As a predominant common issue in this controversy, Trust Class Plaintiffs contend that because of divergent and potentially conflicting interests with the environmental interests of private persons, the settlement by the State was insufficient.
>
> ....
>
> In contrast to the relief trust Class Plaintiffs seek here relating only to the environment and its use, the State when negotiating its settlement, no only had a legitimate variety of divergent public interests such as coast and economic concerns, past and future dealings with the oil industry and these settling defendants, and employment, budgetary and political objectives, but it also, most critically, had its own potential liability exposure in these cases, and thereby obtained important individual monetary and nonmonetary benefits for itself, not its citizens, as part of the Exxon settlement and Plea Agreement.

The district court also noted that the reply brief asserted that the State had breached its fiduciary duties and quoted the following portion of the reply brief:

> In addition, Trust Class Plaintiffs contend that the settlement reached between the State and Exxon provided insufficient

> dollars for presently known environmental injuries because the State negotiated in secret with Exxon, and has not revealed the actual reports of economic studies, on which it purportedly relied in negotiating the settlement.

The district court stated:

> The court views these statements as implying that the consent decree was fraudulently obtained because the State acted in a capacity other than the trustee capacity it represented to the court it was acting under, and because the withholding of the studies kept the court and the public from ascertaining the extent of the insufficiency of the settlement.

[2] The district court noted that sections 3 and 6 of the consent decree provided as follows:

> 3. "State" means the State of Alaska, *in all its capacities,* including all departments, divisions, independent boards, administrations, *natural resource trustees,* and agencies of the state government.
>
> ....
>
> 6(d). "Natural Resource Damages" means compensatory and remedial relief recoverable by the Governments *in their capacity as trustees of Natural Resources on behalf of the public* for injury to, destruction

> of, or loss of any and all Natural Resources resulting from the Oil Spill, whether under the Clean Water Act, . . . , the Trans-Alaska Pipeline Authorization Act, . . . , or any federal or state statute or maritime or common law relating to the environment . . . .

(Emphasis added by district court.) Thus, the district court correctly concluded that the trust plaintiffs were seeking to set aside the provision of the consent decree that provided it was in full payment for the damages to the public's natural resources. The ground for this relief was that the State had purported to represent the public's interest in restoring the natural resources while it had an adverse governmental interest. Thus, the contention is that the State operated in derogation of its fiduciary duties imposing a fraud on the court.

[3] Although the original complaint did not set forth a removable claim, the reply brief did. Section 1446(b) provides in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable . . . .

28 U.S.C. § 1446(b) (emphasis added). The reply brief constitutes the "other paper" justifying the removal.

Appellants contend that removal was untimely because the reply brief did not change the basic theory and nature of the claims, or the relief sought in the form of a conservation trust. They maintain that the appellees were on notice of any purported federal question on which removal could be based, at latest when the trust plaintiffs filed their class certification motion on September 3, 1991. That motion sought certification of a class of all persons "whose use, enjoyment, aesthetic and environmental interests in the protection and enhancement of the ecosystem, wildlife and other natural resources" were injured by the spill. The motion referred to the governmental decree negotiations and the State's alleged conflict of interest. The appellants contend that any removal notice should have been filed within 30 days of that motion.

[4] However, as Judge Holland concluded, the case became removable only when the trust plaintiffs made clear after the consent decree was entered on October 8, 1991, that they intended to pursue additional relief for natural resource damage. The trust plaintiffs would have to be relieved of the consent decree in order to obtain damages beyond those awarded in the consent decree, because it was stated to be full compensation for the public's claim for natural resources damages.

[5] The reply brief was served on October 22, 1991. Because notices of removal were filed on November 21, 1991, removal was within the 30-day period required by section 1446(b) and was timely. The consent decree itself could not have triggered removability because 28 U.S.C. § 1446(b) requires the receipt *by the defendants* of a paper in the action from which removability may be ascertained. The consent decree was not filed in state court in these cases. The reply brief triggered removal, and the Order No. 80 removal notices were timely.

C. *Class Action Plaintiffs' Motion to Remand*

Appellants ask that 14 of the class actions and the *Wisner* case be remanded to state court because the removals were based on a misapplication of 28 U.S.C. § 1441(c). That statute provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c) (Supp. IV 1992).

The plaintiffs in 15 class actions filed in state court filed an Amended Consolidated Class Action Complaint ("Consolidated Complaint").[2] One of the class actions among the 15 was that filed by Alaska Sportfishing Association and several individuals. It is clear that this class action was properly removed because Alaska Sportfishing and the individuals joined the trust plaintiffs' action. The issue is whether the claims of the remaining class action plaintiffs were properly removed. This depends upon the resolution of

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[2]The 15 class actions were as follows: The Eyak native Village, Cordova District Fishermen United, Prince William Sound Settnetters Association, Philip G. McCrudden, Samish Maritime, Inc., Randall P. Babich, Albert Carroll, Ina Thorne, Edward Gregorieff, Kent Herschleb, Marc Van Driessche, Keith H. Gordaoff, Tom Copeland, Sea Hawk Seafoods, and Alaska Sportfishing Association.

whether the Consolidated Complaint joined all 15 class actions and, thus, made them removable as a group.

The Consolidated Complaint, filed on July 17, 1989, sought to create from the 15 separate class actions a consolidation into 5 new proposed classes. The complaint designated which of the plaintiffs in the 15 class actions would be representatives in the 5 superseding classes. The proposed classes were:

1. Alaska Native Class
2. Commercial Fishing Class
3. Processor/Distributor Class
4. Area Business Class
5. Use and Enjoyment Class.[3]

The appellants argue that the Amended Consolidated Complaint left intact the 15 prior class actions. However, this is not a situation in which the class representatives joined in a joint motion or discovery action. This is a situation in which a whole new complaint was voluntarily filed, designating five entirely different classes. The representatives of some of the new classes came from several of the prior classes; for example, the proposed representatives for the Commercial Fishing Class came from 12 of the previously separate class actions.

The plaintiffs in the Amended Consolidated Complaint were free voluntarily to file an amended complaint, joining

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[3]In Pretrial Order No. 22, February 14, 1991, the Superior Court certified the Alaska Native Class, the Commercial Fishing Class, the Area Business Class, and the Property Owner Class. The motion for certification of a Use and Enjoyment Class was denied in Pretrial Order No. 24, February 14, 1991.

their claims and designating new classes, because the defendants had not answered. No court order was required. The plaintiffs did not seek in the Consolidated Complaint to preserve the individual identity of their former class action complaints. As the district court observed, "Fifteen separate class actions could not be transformed into 5 proposed classes without the claims being joined." The same principle applies to the plaintiffs in the *Wisner* case, who later joined in the consolidated action.

The class action plaintiffs argue that the Consolidated Complaint did not join the individual class actions because an earlier state pretrial consolidation order, entered by Judge Shortell, provided that papers filed in the *Exxon Valdez* litigation could be made applicable to multiple actions by including the title and docket number of each action in the caption of the document filed. The appellants contend that by listing each short title and docket number, the separate identities of the cases were preserved. They rely on *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1358 (2d Cir. 1975), *In re Wirebound Boxes Antitrust Litigation,* 128 F.R.D. 262, 264 (D. Minn. 1989), and *In re Equity Funding Corp. of America Securities Litigation,* 416 F. Supp. 161, 176-77 (C.D. Cal. 1976), for the proposition that "consolidation cannot effect a physical merger of the actions or the defenses of the separate parties." *Katz,* 521 F.2d at 1358.

However, none of those cases involved the certification of classes that drew plaintiffs from a variety of other class actions. As we have noted in this litigation, several of the originally individual actions have plaintiffs in more than one new class, and several new classes certified by Judge Shortell contain plaintiffs from more than one of the original cases.

Furthermore, the removal context of the question before us also distinguishes *Katz, Wirebound Boxes,* and *Equity Funding.* In all three cited cases, the consolidated complaints were ordered by the district courts. Judge Shortell did not order the plaintiffs to file a consolidated complaint. In *Wirebound Boxes* and *Equity Funding,* the courts stated that at the conclusion of pretrial proceedings, they would consider whether it was appropriate to preserve for trial and judgment the separate identities of the actions consolidated for pretrial purposes. *Wirebound Boxes,* 128 F.R.D. at 264; *Equity Funding,* 416 F. Supp. at 177 n.12. Judge Shortell made no similar statement. The appellants point to his use of the plural form of "cases" in certain of his orders, but there is no clear indication that the separate identities of the cases were to be preserved. In fact, as Judge Holland reasoned, the plaintiffs' proposal to form 5 classes out of 15 cases indicates just the opposite. Thus, we have more than consolidation alone. *See Katz,* 521 F.2d at 1358.

[6] A class action is "a multiple joinder device, permitting the litigation, in one single action, of multiple claims involving similar or identical questions of law and fact, usually arising from the same set of operative facts." *Lesch v. Chicago & Eastern Illinois R.R. Co.,* 279 F. Supp. 908, 911 (N.D. Ill. 1968). Although the appellants originally filed their class actions separately, they subsequently filed an amended complaint requesting five superseding classes to be constituted of their various individual plaintiffs. We hold that the class actions were joined.

Similarly, the *Wisner v. Exxon Corporation* plaintiffs became part of the action. They joined the class action plaintiffs' motion for class certification, even though the plaintiffs in *Wisner* had filed their own class action motion and complaint, and were not parties to the Consolidated

Complaint. After the state court certified the classes, the *Wisner* plaintiffs became representatives of the Commercial fishing Class, the Area Business Class, and the Property Owner Class. Thus, *Wisner* was joined with the other class actions.

[7] Because the plaintiffs are all in the same case as plaintiffs Alaska Sportfishing Association, who were part of the proposed Conservation Trust Class, asserting a removable claim, Judge Holland properly determined that the claims of the class action plaintiffs were removable pursuant to 28 U.S.C. § 1441(c).

[8] The class action plaintiffs contend that even if there were a joinder with the action of the trust plaintiffs, the removal was not proper because it failed to meet the "separate and independent claim" requirement of section 1441(c). The trust plaintiffs' claims are clearly separate and independent from the claims of the class action plaintiffs and *Wisner* plaintiffs. The plaintiffs are "proceeding to enforce rights that are individual to them," not rights that are jointly held by them. 1A James W. Moore, et al., Moore's Federal Practice ¶ 0.163, at 336 (2d ed. 1993). That is, each of the plaintiffs had a separate and independent claim against the defendants, which could have been sued upon alone without joinder of the other plaintiffs. *See, e.g., Northside Iron and Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798, 801 (5th Cir. 1973). The trust plaintiffs were seeking relief for the general public for damages to the natural resources, whereas the class action plaintiffs were seeking compensatory relief for damages suffered by each member of their classes. The claims were separate and independent. The trust plaintiffs' claims were removable. Thus, the entire case is properly removable under

section 1441(c). *See also Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433 (6th Cir. 1975).

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), does not counsel otherwise. *Finn* involved multiple claims by one plaintiff against three defendants, arising out of a fire loss on property owned by the plaintiff. *Id.* at 7-8. The causes of action against two of the defendants, out-of-state insurance companies, would have been removable if sued upon alone. *Id.* at 8.

The Court analyzed Finn's pleading and determined that a single wrong, the failure to compensate Finn for the property loss, had occurred, *id.* at 14, and that substantially the same facts were contained in the allegations against all three defendants. Consequently, the Court concluded that the claims for relief were not separate and independent, and that removal was not justified. *Id.* at 16.

It is not clear that the rationale of *Finn* applies to the claims of multiple plaintiffs. In any event, the multiple plaintiffs before us have suffered distinctly different harms as a result of the oil spill, and, if they prevail on their claims, are entitled to separate recoveries. Under the *Finn* definition of "cause of action," different "primary rights" are being asserted by different plaintiffs. The claims are separate and independent, and properly were removed.

III.

ORDERS NOS. 83, 91, 92, 108: ALYESKA REMOVALS

On February 13, 1992, Alyeska filed a notice of removal, based on the Plaintiffs' Preliminary Designation of Issues for Trial, filed February 3, 1992. The plaintiffs indicated in that paper that they would support their negligence claims at trial with evidence concerning Alyeska's disregard for tanker and equipment safety standards. Alyeska contended that this raised a federal question because any such claim would be barred by, or would amount to a collateral attack on, injunctions which several oil companies had obtained 15 years earlier against the state's enforcement of certain provisions of the 1976 Alaska Tanker law. *See Chevron, U.S.A., Inc. v. Hammond,* 1978 Am. Mar. Cas. 1697 (D. Alaska 1978) (some provisions of Alaska Tanker Law ar preempted by federal Ports and Waterways Safety Act of 1972, 46 U.S.C. §§ 3701-3718 ("PWSA")).

In Orders Nos. 83, 91, 92, and 108, Judge Holland denied a motion to remand the approximately 150 cases removed by the Alyeska defendants on February 13, 1992. He reasoned that the state law claims were an indirect attempt to enforce the requirements of the Alaska Tanker Law and, therefore, were a collateral attack on *Chevron.* Judge Holland also rejected the plaintiffs' argument that Alyeska's removal was untimely.

The Alyeska removals were triggered by the plaintiffs' suggestion that they would support their negligence claims with evidence concerning Alyeska's disregard of tanker and equipment safety issues. Alyeska's theory of the removal is that any state tort remedy is preempted by the Ports and Waterways Safety Act, 46 U.S.C. §§ 3701-3718, and barred

by past injunctions enforcing federal preemption against state regulatory action: Evidence concerning tanker design and other safety measures cannot be used to establish the proper standard of care because the court, in *Chevron v. Hammond, id.*, has already held that the PWSA preempts state regulation of tanker design and other safety measures. Alyeska reasons that the plaintiffs' action amounts to a collateral attack on the district court's past injunctions, and presents a general federal question. The district court held that the plaintiffs were mounting a collateral attack against *Chevron v. Hammond* because the plaintiffs indicated that they would ask the jury to characterize as "reckless" conduct that complies with federal law.

[9] We need not consider the merits of these removals because the notices or removal at issue on Orders Nos. 83, 91, 92, and 108 were untimely. A notice of removal must be filed within 30 days after the defendant receives "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . ." 28 U.S.C. § 1446(b). Alyeska's notices were filed 10 days after the February 3, 1992, filing of Plaintiffs' Preliminary Designation of Issues for April 1993 Trial in state court. However, no new claims were raised in that document.

[10] The Preliminary Designation essentially asserted that Alyeska caused the oil spill by failing to require use of vessels with double hulls, failing to provide tug escorts and special monitoring systems, and by having the federal district court invalidate Alaska laws that required such measures in *Chevron v. Hammond,* No. A77-195 Civil. The plaintiffs also claimed natural resources damages. The removal was based on the theory that the plaintiffs were collaterally attacking the prior federal judgment in *Chevron.*

[11] These claims were not new. The claims that Alyeska had negligently caused the spill were mentioned in the Plaintiffs' Supplemental Submission in Support of the Case Management Plan, filed Nov. 8, 1991. That memo stated that the factual issues included:

> f. Whether the use of single hull, high tensile steel construction was sufficient to allow the *EXXON VALDEZ* to safely engaged in the trade for which it was intended.
>
> . . . .
>
> i. Whether defendants took adequate preventative measures to minimize the possibility of a spill, in view of the known risk of a spill.

The memo did not indicate in any way that paragraphs (f) and (i) did not apply to Alyeska.

Appellees contend that the claims related to double-hulled tankers were asserted only against Exxon Shipping Company and Exxon Corporation, not against the Alyeska defendants. They argue that the claims that Exxon Shipping Company or Exxon Corporation negligently caused the spill, in part because a single-hulled vessel was used, were not substantial enough to support removal as long as they were asserted only as part of a larger claim of negligence against Exxon Shipping Company and Exxon Corporation. *See Hunter v. United Van Lines,* 746 F.2d 635, 646 (9th Cir. 1984), *cert. denied,* 474 U.S. 863 (1985). A *substantial* proposition of federal law must form a "'direct and essential element of the *plaintiff's* cause of action'" for federal

jurisdiction to be appropriate. *See id.* at 644 (citation omitted). The issue is whether, and when, this was so with regard to Alyeska, thereby enabling Alyeska to argue that the claims involved a collateral attack on *Chevron.*

Appellees contend that the plaintiffs asserted a new claim in the Preliminary Designation by arguing that Alyeska caused the spill by not requiring the measures at issue in *Chevron.* Thus, the federal issues became substantial enough to support removal when the Preliminary Designation was filed.

[12] However, it is clear that Alyeska was aware of the nature of the plaintiffs' claims and their possible connection to *Chevron v. Hammond* long before the removal notices were filed. Eight months earlier, on May 31, 1991, Alyeska stated that the plaintiffs had alleged and put in question tanker design and operation, including the issue of double hulls, and that the actions could not be tried without discovery into the federal government's role in establishing tanker design. The Defendants' Response explained how "the private defendants" would respond to those allegations, and did not distinguish between Alyeska and Exxon. The defendants clearly identified which defendants were concerned with certain of the plaintiffs' allegations.[4]

Further evidence that Alyeska was aware of the nature of the plaintiffs' claims is Alyeska's assertion of a federal preemption defense in its answer filed October 29, 1990, in which Alyeska stated, "certain claims of plaintiff are barred

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[4]For example, in the very next section of the response, the defendants explain how Exxon Shipping and Exxon Corporation would respond to other allegations concerning details of the accident. Alyeska is not mentioned in that section.

or limited by the comprehensive system of federal statutes and regulations and by maritime and admiralty law." Appellees contend that the defense did not refer to the PWSA and was not asserted to rebut a claim that the Alyeska defendants negligently caused the spill by failing to implement the measures at issue in *Chevron.* Rather, the answer was intended to preserve the defense that some of plaintiffs' claims related to the alleged negligence in the clean up were preempted by the TAPAA. However, the plain language of paragraph 13 of the answer is quite broad, and separate affirmative defenses asserted in the answer refer to TAPAA. Although the defense of preemption does not support removal, the answer indicates that Alyeska was aware at that time of the nature of the plaintiffs' claims and their possible connection to *Chevron v. Hammond.*

Alyeska's removal notices were untimely.

CONCLUSION

[13] Order No. 80 is affirmed. The other orders are reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

APPENDIX B

APPENDIX B(i)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 83

MOTIONS TO REMAND

Approximately 150 cases[1] arising from the grounding of the *Exxon Valdez* were removed from state court by the Alyeska defendants[2] ("Alyeska"). The State Court Plaintiffs filed a motion to remand Case Nos. A92-077 through

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[1]Case Nos. A92-077 through A92-226, and A92-278.

[2]Alyeska Pipeline Service Company (D-3); Amerada Hess Pipeline Corporation (D-11); ARCO Transportation Alaska, Inc. (D-12); Mobil Alaska Pipeline Company (D-14); BP Pipelines (Alaska), Inc. (D-19); Phillips Alaska Pipeline Corporation (D-20); Unocal Pipeline Company (D-21); and George M. Nelson (D-9).

A92-226 (except Case Nos. A92-174, A92-175, and A92-215),[3] and Case No. A92-278. The State of Alaska filed a separate motion to remand Case No. A92-175. Alyeska filed a joint opposition to both motions. The State Court Plaintiffs and the State separately replied. The court heard oral argument on both motions.

The removals were based on two statements made in Plaintiffs' Preliminary Designation of Issues for April 1993 Trial, filed on February 3, 1992, in state court. The first statement, as perceived by Alyeska, was that Alyeska caused the grounding of the *Exxon Valdez* and the resulting oil spill by failing to require vessels to have double bottoms, by failing to provide tug escorts, by failing to provide a special vessel monitoring and communication system, and by having this court, in *Chevron v. Hammond,* Case No. A77-195 Civil, invalidate Alaska statutes and regulations which required these same measures. The second statement was plaintiffs' claim for natural resource damages.

Chevron v. Hammond

Chevron v. Hammond, Case No. A77-195 Civil, was filed in this court in 1977 and assigned to Judge Fitzgerald.[4] Plaintiffs were a number of oil companies, including Exxon Corporation. None of the Alyeska defendants were plaintiffs in *Chevron v. Hammond.* Defendants in *Chevron v.*

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[3]Case No. A92-174 was filed by Thomas Lakosh and has a pending motion to remand. Case No. A92-215 is a class action complaint prepared by attorney Melvin Belli; no motion to remand is pending.

[4]Complaint, Exhibit 7 to State Court Plaintiffs' motion (Clerk's Docket No. 2363).

Hammond were various Alaska state officials including the attorney general.

Chevron v. Hammond was an action brought to have declared unconstitutional and to enjoin enforcement of certain Alaska laws and regulations[5](hereinafter referred to as the "Alaska Tanker Law") (1) regulating the design, equipment, navigation, operation, certification, inspection, financial responsibility, oil spill liability, and clean-up capability and responsibility of oil tankers entering Alaska waters, (b) establishing a Coastal Protection Fund financed by "risk charges" imposed on tankers, and (c) imposing criminal and civil penalties for noncompliance.

The Alaska Tanker Law required all tank vessels engaged in the marine transportation of crude oil to have a LORAN-C navigational and communication system, and electronically controlled collision avoidance system, and a dual radar system. It also required that all tank vessels be escorted by tugs meeting specified power requirements in prescribed coastal areas. In addition, it imposed a certificate and assessment system which required terminals and vessels to obtain certificates of risk avoidance upon payment of "risk charges". The "risk charge" was to be set by the Alaska Department of Environmental Conservation ("ADEC") based on such factors as whether the vessel had a double hull.

While *Chevron v. Hammond* was pending, the United States Supreme Court issued *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), a decision which involved the State of Washington's tanker law. The Court held that insofar as the

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[5]Chapter 266 of the 1976 Laws of Alaska and the implementing regulations. Exhibit 1 to Alyeska's opposition (Clerk's Docket No. 2505).

Washington tanker law required double hulls, dual radar, and a collision avoidance system, it was unconstitutional because it was preempted by Title II of the Ports and Waterways Safety Act ("PWSA").[6] As a consequence, the *Chevron v. Hammond* parties agreed to a Partial Final Judgment and Permanent Injunction[7] which enjoined defendants from taking any action to implement or enforce the Alaska Tanker Law and implementing regulations that required tank vessels to have dual radar systems, collision avoidance radar, and LORAN-C navigational equipment; and ADEC regulations requiring tug escorts for vessels in Prince William Sound.

The parties in *Chevron v. Hammond* could not agree as to the effect of *Ray* on that portion of the Alaska Tanker Law concerning "risk charges". (Risk charges were determined on whether a tanker had a double bottom or a double hull, among other things.) Judge Fitzgerald tried the issue and ruled that the risk charge system was also preempted by Title II of the PWSA. *Chevron U.S.A., Inc. v. Hammond,* 1978 A.M.C. 1697 (D. Alaska 1978).

Judge Fitzgerald entered a Partial Final Judgment and Order[8] enjoining defendants from taking any action to implement or enforce the provisions of the Alaska Tanker Law which assessed risk charges.

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[6]Previously codified at 46 U.S.C. § 391a. The PWSA has been comprehensively amended since the decision in *Ray*. Section 391a was repealed and replaced by various new sections. The current sections that concern oil tankers are located in 46 U.S.C. §§ 3701-3718. The amendments do not undermine the judgment in *Chevron v. Hammond*.

[7]Exhibit 3 to Alyeska's opposition (Clerk's Docket No. 2505).

[8]Exhibit 5 to Alyeska's opposition (Clerk's Docket No. 2505).

Preliminary Designation of Issues

In the removed cases which plaintiffs commenced as a consequence of the grounding of the *Exxon Valdez,* the state court set a date of April 19, 1993, for trial of the liability and punitive damages issues. The state court required all parties asserting claims to file a statement of issues for that trial, including a summary of factual and legal contentions. On February 3, 1992, plaintiffs filed a Preliminary Designation of Issues for April 1993 Trial ("Preliminary Designation") which addressed issues of liability, including liability for punitive damages.[9]

The claims asserted in the Preliminary Designation which involved *Chevron v. Hammond* and which, in part, prompted Alyeska to remove the remaining state cases are:

> B. The Conduct of the Alyeska Defendants Concerning Tanker Operations in Prince William Sound Was Undertaken With Reckless Indifference to the Interests, Rights and Safety of Others and Was Sufficiently Outrageous to be Deemed Equivalent to Actual Malice.
>
> 1. ....
>
> 2. The Alyeska Defendants Acted With Reckless Indifference to the Interests of Others When They Failed to Take Steps to Prevent Oil Spills in Prince William Sound

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[9]Exhibit 4 to State Court Plaintiffs' motion (Clerk's Docket No. 2363).

From Tankers Loaded at the Alyeska Terminal.

a. The Alyeska defendants were unwilling to incur the cost of taking the following kinds of preventive measures:

(1) requiring all TAPS oil to be carried in double-bottomed tankers;

(2) providing tug escorts for all loaded tankers until they reach open water;

(3) providing a vessel monitoring and communications system that could monitor the position of all TAPS tankers between Hinchinbrook entrance and the Valdez terminal;

(4) ....

(5) ....

(6) ....

b. ....

c. Most of these preventive measure were urged upon the Alyeska defendants by Alaska native corporations during construction of the pipeline, and several were required by legislation enacted before the terminal began operating. The Alyeska defendants ignored the native corporations

> and succeeded in having a court overturn the legislation.

Preliminary Designation at 19-22.[10]

Alyeska relied on these statements in the Preliminary Designation as supporting removal because, Alyeska argued, the claims (1) are exclusively governed by federal law, (2) are barred by federal *res judicata,* and (3) constitute an improper collateral attack on the judgment in *Chevron v. Hammond.*

The Preliminary Designation also made numerous references to natural resources damages under Section C, which reads:

> C. As a Natural and Foreseeable Consequence of the Defendants' Actions and Omissions, the EXXON VALDEZ Oil Spill Caused Grave and Long-Standing Damage to the Environment of Prince William Sound and Beyond and Thereby Caused Substantial Damage to Plaintiffs and Members of the Plaintiff Classes, Who Depend Upon that Environment for their Livelihood and Lifestyle.

Preliminary Designation at 33.[11]

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[10]Exhibit 4 to State Court Plaintiffs' motion at 28-31 (Clerk's Docket No. 2363).

[11]Exhibit 4 to State Court Plaintiffs' motion at 42 (Clerk's Docket No. 2363).

Alyeska relied on those statements to support removal because, Alyeska argued, claims for natural resources damages are barred by the express terms of the Agreement and Consent Decree entered in *United States v. Exxon Corp.*, Case No. A91-082 Civil, and *State of Alaska v. Exxon Corp.*, Case No. A91-083 Civil.

State's Motion to Remand

The State's motion to remand Case No. A92-175 is based on essentially the same legal arguments that the State Court Plaintiffs made in their motion. However, the State did raise two arguments which apply only to the State. We address these first and separately.

The State first argued that it never adopted those factual contentions which are at issue here. The state court record, however, reflects the following. The State filed a Supplement to Plaintiffs' Preliminary Designation of Issues for April 1993 Trial ("Supplement")[12] on February 3, 1992, the same date the plaintiffs filed their Preliminary Designation. The Supplement stated:

> Rather than produce a lengthy, but substantially similar, separate document, the State of Alaska prefers to join in the Preliminary Designation, and reserves the right to subsequently specify contentions not adopted if that ever becomes relevant or appropriate.

[12]Exhibit H to State's motion (Clerk's Docket No. 2371).

Supplement at 2. On February 7. 1992, the defendants, including Alyeska, filed in state court a Motion Suggesting Topics for February 14, 1992 Status Conference[13] which proposed that the State be ordered to specify which contentions listed in the Preliminary Designation it did not adopt.

On February 28, 1992, *after* Alyeska had removed these cases on February 13, 1992, the State filed its Clarification of State of Alaska's Supplement to Plaintiff's Designation of Issues.[14] In the Clarification, the State specified that it did not adopt the contentions at issue here.

The State argued that since it clarified its position on the Preliminary Designation during the thirty-day period Alyeska had after the February 3, 1992, filing of the Preliminary Designation to remove the cases, the State should not be penalized. For purposes of removal, the question of whether jurisdiction exists is determined at the time the notice of removal is filed. *Pullman v. Jenkins,* 305 U.S. 534, 537 (1939); *Brown v. Southwestern Bell Telephone Co.,* 901 F.2d 1250, 1254 (5th Cir. 1990). If there is a subsequent narrowing of issues to eliminate federal claims, federal jurisdiction is not extinguished. *Brown,* 901 F.2d at 1254.

On February 13, 1992, when the cases were removed, the State had not yet specified any contentions in the Preliminary Designation which it did not adopt. Furthermore, the State did not repudiate its claim for punitive damages

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[13]Exhibit B to State's reply (Clerk's Docket No. 2472).

[14]Exhibit J to State's motion (Clerk's Docket No. 2371).

against Alyeska[15] and the contentions at issue form the basis for the request for punitive damages. The State's subsequent clarification is not effective for purposes of defeating removal jurisdiction.

The State's second argument was that Alyeska's counterclaim against the State must be remanded due to Eleventh Amendment considerations. Alyeska agrees that the counterclaim must be remanded.[16]

Timeliness

Plaintiffs raised the argument that removal was untimely pursuant to 28 U.S.C. § 1446(b). The pertinent portion of Section 1446(b) reads as follows:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other papers *from which it may first be ascertained* that the case is one which is or has become removable....

28 U.S.C. § 1446(b) (emphasis added). Alyeska contended that plaintiffs' February 3, 1992, Preliminary Designation was the "or other paper" from which it was first ascertained that a federal issue was raised. Since the cases were removed ten days later, Alyeska argued, the removal was timely.

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[15]Supplement, Exhibit H to State's motion at 4 (Clerk's Docket No. 2371).

[16]Alyeska's opposition at 51, n.22 (Clerk's Docket No. 2505).

Plaintiffs responded that Alyeska had notice long before the Preliminary Designation that these matters were involved. Plaintiffs submitted a list of the complaints which contained allegations regarding double hulls.[17] The State's complaint also raised the matter of double hulls.[18]

The complaints plaintiffs directed the court's attention to do contain allegations that Exxon was negligent by operating a single hull tanker. No claim that Alyeska was negligent in regard to single hull tankers was made until the February 3, 1992, Preliminary Designation was filed.

The allegations regarding double hulls did not give rise to a right to remove when they were asserted against Exxon because those allegations were not sufficiently substantial to support removal. Plaintiffs had alleged numerous alternative theories in support of the allegations of negligence asserted against Exxon. Where a claim for relief can be established through several different theories, and only one of those several theories raises an issue of federal law, the federal law issue is generally not considered substantial enough to support removal. *Christianson v. Colt Industries,* 486 U.S. 800, 811 (1988); *Hunter v. United Van Lines,* 746 F.2d 635, 646 (9th Cir. 1984), *cert. denied,* 474 U.S. 863 (1985). In contrast, the claim against Alyeska for causing the spill, which was raised in the Preliminary Designation, does not have alternative theories. If federal law is involved in the claim against Alyeska, which was raised in the Preliminary

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[17]Exhibit 16 to State Court Plaintiffs' motion at § 3 (Clerk's Docket No. 2363); see also Exhibit 18 at ¶ 25(c), Exhibit 13 at 33-34, and Exhibit 11 at 6.

[18]Exhibit C to State's motion at 26, ¶ 76, ¶ 77 & ¶ 92 (Clerk's Docket No. 2371).

Designation, it would be substantial enough to support removal.

Plaintiffs did not direct the court to any earlier references to Alyeska's failure to require double hulls, tug escorts, or radar and navigational systems, which were the subject of *Chevron v. Hammond.* At most, plaintiffs made earlier reference to Alyeska's failure to take "adequate preventative measures,"[19] which is too generalized of a statement to have alerted Alyeska that *Chevron v. Hammond* was implicated.

The court has concluded that the contentions against Alyeska regarding double hulls, tug escorts, radar and navigational systems were first raised in the February 3, 1992, Preliminary Designation. Removal, therefore, was timely.

Complete Preemption

Alyeska contended that the Supreme Court's decision in *Ray* and Judge Fitzgerald's opinion in *Chevron v. Hammond* clearly establish oil taker design as one of those areas so exclusively governed by federal law that the doctrine of "complete preemption" applies to supply a basis for removal.

The test for complete preemption is whether Congress "clearly manifested an intent" to convert a state law complaint into one stating a federal claim. *Price v. PSA, Inc.,* 829 F.2d 871, 876 (9th Cir. 1987), *cert. denied sub nom., Psgroup v. United States Dist. Court for Southern Dist.*

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[19]Exhibit 13 to State court Plaintiffs' motion at 34, ¶ i (Clerk's Docket No. 2363).

of California, 486 U.S. 1006 (1988) (citing *Metropolitan Life Insurance Co. v. Taylor,* 481 U.s. 58, 66 (1987)). The requisite congressional intent for complete preemption has not been shown here to be "clearly manifested". In *Metropolitan life,* 481 U.S. 58 (1987), Justice Brennan and Justice Marshall wrote in their concurring decision:

> [O]ur decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to preempt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* manifested an intent to make causes of action ... *removable to federal court.*" In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court.

Metropolitan Life, 481 U.S. at 67-68 (emphasis in original; citation omitted).

Alyeska's complete preemption argument is not persuasive.

Federal Res Judicata

Alyeska's federal *res judicata* argument is closely related to its complete preemption argument. Essentially the federal *res judicata* argument is that plaintiffs' state law claim is an "artfully pleaded" federal claim which has already been determined in this court in *Chevron v. Hammond.*

The artful pleading doctrine has been used in combination with the doctrine of *res judicata* to allow removal under limited circumstances.

> In both *Salveson [v. Western States Bankcard Ass'n,* 731 F.2d 1423 (9th Cir. 1984)] and *Sullivan [v. First Affiliated Secur., Inc.,* 813 F.2d 1368 (9th Cir.), *cert. denied,* 484 U.S. 850 (1987)], this court looked to *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 101 S. Ct. 2424, 69 L.Ed.2d 103 (1981), and concluded that where a plaintiff files state claims after a federal judgment has been entered against him *on essentially the same claims,* the district court may invoke the artful pleading doctrine as a basis for federal jurisdiction and dismiss the claims under the principles of res judicata.

Ultramar America, Ltd. v. Dwelle, 900 F.2d 1412, 1415 (9th Cir. 1990 (emphasis added).

The claim involved in *Chevron v. Hammond* was a challenge to the validity of the Alaska Tanker Law. The punitive damages claims involved here are an attempt to punish the oil industry for having been successful in *Chevron*

v. Hammond. While *Chevron v. Hammond* provoked the claims involved here, the claims involved in the two cases are not "essentially the same" for purposes of the artful pleading doctrine. The validity of a state statute is not the same issue as liability for punitive damages to private parties.

Federal *res judicata* does not provide support for Alyeska's removal of these cases.

Collateral Attack

Alyeska argued that as a result of the judgment in *Chevron v. Hammond,* the oil companies were legally entitled to follow federal law rather than the requirements of the Alaska Tanker Law. Alyeska interpreted the Preliminary Designation as indicating that plaintiffs plan to ask an Alaska jury to characterize conduct which complies with federal law as reckless. Alyeska contended that plaintiffs' efforts to impose a standard on Alyeska which is inconsistent with the judgment in *Chevron v. Hammond* is a collateral attack on that judgment.[20]

Plaintiffs responded that they are not challenging the judgment in *Chevron v. Hammond* as being invalid or not effective. Rather, plaintiffs contended that they are not subject to the judgment and that they are merely presenting evidence relating to the factual contentions as part of their proof on the issues of liability and punitive damages. The language of the Preliminary Designation, particularly the heading for Section B, is at odds with plaintiffs' statement that these are merely factual contentions.

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[20]A collateral attack was defined by Alyeska at oral argument as any attempt to relitigate issues or claims which were decided by a prior judgment.

Where a collateral attack is involved, a state court action may be removed to the appropriate federal court on the basis of a general federal question. 7 *Moore's Federal Practice* ¶ 60.38[1].

> [A]n action to enjoin or otherwise obtain relief from a federal judgment involves the validity of the judgment as a continuing obligation; the substantive principles of the action are federal; and, we believe, presents a general federal question.

Id. (footnotes omitted).

In support of its collateral attack argument, Alyeska cited a number of analogous cases, including *Striff v. Mason,* 849 F.2d 240 (6th Cir. 1988), and *Nowling v. Aero Services International, Inc.,* 734 F. Supp. 733 (E.D. La. 1990). The court finds these cases to be very persuasive. In *Striff*—an employment discrimination case which raised claims settled by a consent decree that controlled promotions within the police department and that was entered in previous litigation to which plaintiff was not a party—the court stated:

> Where an action appears to involve issues unrelated to a consent decree, but examination of the substance of the claim reveals that a consent decree is implicated and its implementation would be adversely affected, the action is properly considered a collateral attack on the decree.

Striff, 849 F.2d at 245. The court held that plaintiff's claim that there should be no promotions to lieutenant so long as plaintiff was held to be ineligible "had a sufficient federal

character to support removal" under 28 U.S.C. § 1441(b). *Striff,* 849 F.2d at 245.

In *Nowling,* shareholders brought an action in state court which sought a declaration that a state statute applied to the defendant corporation's voting shares. Two previous federal cases had held that the statute did not apply to this defendant corporation's voting shares (referred to as the "*Trenk* Orders"). The state case was removed and a motion to remand was denied. The court stated:

> Thus, what the Nowlings [plaintiffs] really want is not the isolated ruling of a state court, but a repudiation of this Court's earlier *Trenk* Orders by a state court. ...In fact, a purported state law claim that has sufficient federal character may be removed. And a state law claim is said to have federal character when, as here, it calls into question a federal court order.

Nowling, 734 F. Supp. at 737 (citations omitted).

Alyeska argued that plaintiffs' claims are in reality claims to enforce the requirements enjoined by the judgments in *Chevron v. Hammond.* Plaintiffs responded that the injunctions are limited to enforcement of the Alaska Tanker Law and its implementing regulations and that plaintiffs are not attempting to enforce that invalidated statute and its regulations. Alyeska argued that the measures, such as double hulls, plaintiffs want the jury to impose as the necessary standard of care are the same measures required by the Alaska Tanker Law. The following additional precedents demonstrate that Alyeska has the better of the argument.

In *Palmer v. Kiggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), the court held that in a suit for damages against cigarette manufacturers and distributors, which was based on a common law theory of inadequate warnings about harmful health effects of cigarette smoking, the common law cause of action was preempted by the Federal Cigarette Labeling and Advertising Act.[21] The court reasoned that the state common law theory would excessively disrupt the balance of purpose between health protection and trade regulation established by Congress under the Act.

> If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirements as "promulgated" by a jury's findings.
>
> ....
>
> ...Effecting such a change in the manufacturer's warning requirements is the

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[21]On June 24, 1992, the United States Supreme Court decided *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, which held that section 5 of the Federal Cigarette Labeling and Advertising Act of 1965 did not preempt state law damages actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements. The Court also held that the broad language of amended section 5(b) of the Public Health Cigarette Smoking Act of 1969 extends the section's preemptive reach beyond positive enactments to include some common law damages actions.

> very action preempted by § 1334 of the Act. Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

Palmer, 825 F.2d at 627-28. In *Chevron v. Hammond,* Judge Fitzgerald held that the Alaska Tanker Law was preempted by the PWSA. To allow the jury to impose damages, indeed punitive damages, against Alyeska for not having double hulls, tug escorts and specific navigational and communication equipment, which are not required by the PWSA, would undermine the objectives established by Congress under the PWSA. If successful, plaintiffs' state court claims would effectively compel the use of double hulled vessels, despite this court's holding that such a requirement is preempted.

In *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), the Supreme Court held that where picketing by unions was arguably encompassed by the National Labor Relations Act,[22] a state court had no

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[22] When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted....

> ...If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7 or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither

jurisdiction to award the employer damages for injuries caused by picketing on the grounds that picketing constituted a tort under state law.

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the [National Labor Relations] Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are

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> protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States ....
>
> ...Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245-6 (1959).

> potentially subject to the exclusive federal regulatory scheme.

Garmon, 359 U.S. at 247, *quoted in Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4708 (U.S. June 24, 1992).[23]

In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), a suit alleging unfair competition regarding a pole lamp, the Court held that because of federal patent laws, a state may not award damages for copying articles which are unpatented and uncopyrighted.

> Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding

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[23]In his dissent, Justice Blackmun took issue with the majority's reliance on *Garmon*.

> [T]he Court apparently finds *Garmon's* statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," ... sufficient authority to warrant extinguishing the common-law actions at issue in this case. ...I am not persuaded. Not only has the Court previously distinguished *Garmon*, but it has declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption.

Cipollone, 60 U.S.L.W. at 4712 (footnote omitted). *Garmon* was previously distinguished as being a case which involved a special "presumption of federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. *Cipollone*, 60 U.S.L.W. at 4712, n.3. *See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984).

> unfair competition, give protection of a kind that clashes with the objectives of the federal patent law.

Stiffel, 376 U.S. at 231.

While plaintiffs' claims do not specifically seek to enforce the Alaska Tanker Law and its regulations, the end result is the same. Plaintiffs are attempting to impose damages on Alyeska as punishment for not having met the same standards that the Alaska Tanker Law required. In addition, the plaintiffs apparently seek to punish Alyeska for challenging the Alaska Tanker Law in court even though Alyeska was not a party to *Chevron v. Hammond.* Plaintiffs' state court claims must be considered to come within the scope of the *Chevron v. Hammond* injunctions because they are an indirect attempt to enforce the requirements of the Alaska Tanker Law.

The court concludes that the claims of all the moving plaintiffs and the State were properly removed by Alyeska. The claims are a collateral attack on *Chevron v. Hammond.*

Consent Decree

Plaintiffs' final argument in support of their motion to remand is that their claim for natural resource damages, as presented in the Preliminary Designation, is only for private damages and, therefore, is not barred by the Agreement and Consent Decree entered in *United States v. Exxon Corporation,* Case No. A91-082 Civil, and *State of Alaska v. Exxon Corporation,* Case No. A91-083 Civil. Plaintiffs argued that the consent decree is not *res judicata* because the state court plaintiffs were not parties to the consent decree. Plaintiffs further argued that even if the consent decree were

res judicata as to the claims of the state court plaintiffs, it would not render the state court cases removable.

Assuming, without deciding, that the consent decree is *res judicata* as to the plaintiffs' claims for natural resource damages, that merely raises a defense. A defense, even a federal defense, does not support removal.

Conclusion

The State Court Plaintiffs' motion to remand Case Nos. A92-077 through A92-226 (except Case Nos. A92-174, A92-175, and A92-215), and Case No. A92-278 is denied. The Preliminary Designation constitutes a collateral attack on *Chevron v. Hammond*. For the same reason, the State's motion to remand Case No. A92-175 is denied. Alyeska's counterclaim against the State, which is included with Case No. A92-175, is severed and remanded.

Plaintiffs have fifteen (15) days from the date of this order to oppose defendants' Motion to Vacate Pretrial Order No. 34 and Trial-Setting Order.[24] Plaintiffs were previously prevented from opposing the motion by this court's stay on motion practice. In Order No. 79,[25] this court deferred ruling on the motion until after the motions to remand were decided. Any further filings related to the Preliminary Designation of Issues for April 1993 Trial are stayed.

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[24]Clerk's Docket No. 2401.

[25]Clerk's Docket No. 2483.

DATED at Anchorage, Alaska, this 31 day of July, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX B

APPENDIX B(ii)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 91

MOTION FOR REMAND IN CASE NO. A92-353 CIVIL
(P-5464 TO P-5576)

On December 24, 1991, *Adams v. Exxon Corp.*, Case No. 3CO-91-96 was filed in Superior Court. Defendants removed (Clerk's Docket No. 2081) the action to federal court on January 14, 1992, Case No. A92-029 Civil. One day after removal, the plaintiffs voluntarily dismissed the action (Clerk's Docket No. 2084). Then, on March 18, 1992, *Adams v. Exxon Corp.* was refiled in Superior Court with

some additional plaintiffs[1] (Collectively "Adams" plaintiffs) (P-5464 through P-5576). Defendants removed this action on April 16, 1992, Case No. A92-353 Civil. The *Adams* plaintiffs move for remand.[2] Oral argument has been requested, but is deemed unnecessary.

This court held in Order No. 83 (Clerk's Docket No. 2710), filed July 31, 1992, that the February Preliminary Designation of Issues ("Designation") filed by the state court plaintiffs on February 3, 1992, constituted a collateral attack on a federal judgment, specifically the judgment in *Chevron v. Hammond,* Case No. A77-195 Civil, and thus found the extensive removals to be proper because of the existence of a federal issue.

The *Adams* plaintiffs recognize this court's Order No. 83. Notwithstanding their disagreement with the order, it is the law of the case. Therefore, if the Designation is deemed to apply to the *Adams* plaintiffs, removal was proper because of the existence of a federal question in the collateral attack on a federal judgment.

The dispute centers around two pretrial orders entered in Superior Court. Pretrial Order No. 1, dated June 8, 1989, filed in state court states:

> Any other related actions hereafter filed in this Court shall be consolidated with these cases for pretrial purposes. Each party whose case is consolidated will be governed

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[1]The refiled Superior Court case was assigned Case No. 3AN-92-2359 Civil.

[2]Clerk's Docket No. 2545.

> by the terms of this and any subsequent pretrial order entered by the Court, unless a party has made a specific objection to any pretrial order or to the objectionable portion of any pretrial order, and the Court, after hearing, has sustained such objection.

Pretrial Order No. 1, at 2.

Pretrial Order No. 37, dated January 27, 1992, states: "All parties asserting any claim or counterclaim shall . . . file a statement of issues they intend to try at the trial." Pretrial Order No. 37, at 1. On February 3, 1992, the Designation was filed, which formed the basis of the notices of removal, and subsequently formed the basis of this court's determination that the removals were proper.

The issue is whether Pretrial Order No. 1, and Pretrial Order No. 37, which ordered the filing of the Designation, render the Designation binding upon litigants not parties to the oil spill case when the Designation was filed on February 3, 1992, notwithstanding the extensive removals that occurred on February 13, 1992.

The *Adams* plaintiffs were governed by Pretrial Order No. 1. As a result, the action was consolidated and subject to all pretrial orders of the Superior Court including Pretrial Order No. 37, which required the statement of issues. When defendants removed *Adams* on April 16, 1992, *Adams* had been on file for almost one month. The *Adams* plaintiffs had sufficient time to object to the Designation, which was required by Pretrial Order No. 37, or be bound by it as stated in Pretrial Order No. 1. The Designation applied to the *Adams* plaintiffs and as such, removal was proper.

Lastly, defendants removed this action in a timely manner because defendants removed this action within thirty days of first ascertaining that the *Adams* plaintiffs' action was removable, 28 U.S.C. § 1446(b), which was the date the Designation was binding upon these plaintiffs, the date this action was refiled in state court, March 18, 1992.

CONCLUSION

The *Adams* plaintiffs' motion for remand is DENIED.

Dated at anchorage, Alaska this 15 day of September, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX B

APPENDIX B(iii)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 92

Case No. A92-461

D.M. ADAMS' (P5584 THROUGH P-5618)
MOTION FOR REMAND

On June 3, 1992, *Adams v. Exxon Corp.*, Superior Court No. 3KN-92-526, was filed in state court. Exxon Corp. (D-1), Exxon Shipping, Inc. (D-2), and Alyeska Pipeline Service Co. (D-3) removed the action to this court on June 26, 1992, Case No. A92-461 Civil. The plaintiffs in Case No. A92-461 Civil (P-5584 through P-5618) (collectively referred to as "Adams plaintiffs") moved for remand (Clerk's Docket No. 2751) on August 18, 1992. The

court assumes, but does not decide, that the Adams plaintiffs' motion for remand was timely.

This court held in Order No. 83 (Clerk's Docket No. 2710), filed July 31, 1992, that the February Preliminary Designation of Issues ("Designation") filed by the state court plaintiffs on February 3, 1992, constituted a collateral attack on a federal judgment, specifically the judgment in *Chevron v. Hammond,* Case No. A77-195 Civil, and thus found the extensive removals to be proper because of the existence of a federal issue.

The Adams plaintiffs recognize this court's Order No. 83. Notwithstanding their disagreement with the order, it is the law of the case. Therefore, if the Designation is deemed to apply to the Adams plaintiffs, removal was proper because of the existence of a federal question in the collateral attack on a federal judgment.

The dispute centers around two pretrial orders entered in Superior Court. Pretrial Order No. 1, dated June 8, 1989, filed in state court states:

> Any other related actions hereafter filed in this Court shall be consolidated with these cases for pretrial purposes. Each party whose case is consolidated will be governed by the terms of this and any subsequent pretrial order entered by the Court, unless a party has made a specific objection to any pretrial order or to the objectionable portion of any pretrial order, and the Court, after hearing, has sustained such objection.

Pretrial Order No. 1, at 2.

Pretrial Order No. 37, dated January 27, 1992, states: "All parties asserting any claim or counterclaim shall . . . file a statement of issues they intend to try at the trial." Pretrial Order No. 37, at 1. On February 3, 1992, the Designation was filed, which formed the basis of the notices of removal, and subsequently formed the basis of this court's determination that the removals were proper.

The issue is whether Pretrial Order No. 1, and Pretrial Order No. 37, which ordered the filing of the Designation, render the Designation binding upon litigants not parties to the oil spill case when the Designation was filed on February 3, 1992, notwithstanding the extensive removals that occurred on February 13, 1992.

The court concludes that the Adams plaintiffs were governed by Pretrial Order No. 1. As a result, the action was consolidated and subject to all pretrial orders of the Superior court including Pretrial Order No. 37, which required the statement of issues. When defendants removed *Adams* on June 26, 1992, *Adams* had been on file for over three weeks. The Adams plaintiffs had sufficient time to object to the Designation, which was required by Pretrial Order No. 37, or be bound by it as stated in Pretrial Order No. 1. The Designation applied to the Adams plaintiffs and as such, removal was proper.

The Adams plaintiffs' motion for remand (Clerk's Docket No. 2751 is DENIED.

Dated at Anchorage, Alaska this 17 day of September, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX B

APPENDIX B(iv)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

Case No. A89-095 Civil
(Consolidated)

In re

the EXXON VALDEZ

ORDER NO. 108

MOTION FOR REMAND IN CASE NO. A92-584 CIVIL

P-2989, P-2997, P-3004, P-4169
AND P-5619 THROUGH P-5643
MOTION FOR REMAND

Talmadee Adams v. Exxon Corp., Superior Court No. 3KN-91-787 Civil, was filed in state court on August 11, 1992. Exxon Corporation (D-1), Exxon Shipping (D-2), and Alyeska Pipeline Service Company (D-3), collectively "defendants", removed the action to this court on September 8, 1992, where the action became Case

No. A92-584 Civil. Plaintiffs move for remand.[1] Defendants oppose the motion.[2] No reply was filed and the time for reply has run.

This court held in Order No. 83,[3] filed July 31, 1992, that the February Preliminary Designation of Issues ("Designation") filed by the state court plaintiffs on February 3, 1992, constituted a collateral attack on a federal judgment, specifically the judgment in *Chevron v. Hammond,* Case No. A77-195 Civil, and thus found the extensive removals to be proper because of the existence of a federal issue.

The plaintiffs in Case No. A92-584 recognize this court's Order No. 83. Notwithstanding their disagreement with the order, it is the law of the case. Therefore, if the Designation is deemed to apply to the plaintiffs, removal was proper because of the existence of a federal question in the collateral attack on a federal judgment.

The dispute centers around two pre-trial orders entered in Superior Court. Pretrial Order No. 1, dated June 8, 1989, filed in state court states:

> Any other related actions hereafter filed in this Court shall be consolidated with these cases for pretrial purposes. Each party whose case is consolidated will be governed by the terms of this and any subsequent

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[1]Clerk's Docket No. 2914.

[2]Clerk's Docket No. 2964.

[3]Clerk's Docket No. 2710.

> pretrial order entered by the Court, *unless a party has made a specific objection to any pretrial order or to the objectionable portion of any pretrial order,* and the Court, after hearing, has sustained such objection.

Pretrial Order No. 1, at 2 (emphasis added).

Pretrial Order No. 37, dated January 27, 1992, states: "All parties asserting any claim or counterclaim shall . . . file a statement of issues they intend to try at the trial." Pretrial Order No. 37, at 1. On February 3, 1992, the Designation was filed, which formed the basis of the notices of removal, and subsequently formed the basis of this court's determination that the removals were proper.

The issue is whether Pretrial Order No. 1, and Pretrial Order No. 37, which ordered the filing of the Designation, render the Designation binding upon litigants not parties to the oil spill case when the Designation was filed on February 3, 1992, notwithstanding the extensive removals that occurred on February 13, 1992.

The plaintiffs were governed by Pretrial Order No. 1. As a result, the action was consolidated and subject to all pre-trial orders of the Superior Court including Pretrial Order No. 37, which required the statement of issues. When defendants removed this action on September 8, 1992, this case has been on file for almost one month. The plaintiffs had sufficient time to object to the Designation, which was required by Pretrial Order No. 37, or be bound by it as stated in Pretrial Order No. 1. The Designation applied to the plaintiffs and as such, removal was proper.

The motion for remand (Clerk's Docket No. 2914) is DENIED.

Dated at anchorage, Alaska, this 16th day of November, 1992.

/s/ H. Russel Holland
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-35274

EYAK NATIVE VILLAGE, et al.,
Plaintiffs-Appellants,

v.

EXXON CORPORATION, et al.,
Defendants-Appellees.

Filed July 13, 1994

ORDER

Before: CHOY, HUG, AND LEAVY, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellants' petition for rehearing and appellees' petition for partial rehearing, filed June 10, 1994. Judges Hug and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Choy has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for partial rehearing are **DENIED** and the suggestion for rehearing en banc is **REJECTED.**

APPENDIX D

TEXT OF STATUTES INVOLVED

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

28 U.S.C. § 1441.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant

or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * *

28 U.S.C. § 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim

for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * *

28 U.S.C. § 1447

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees,

incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

* * *